In The

Supreme Court of the United States

OCTOBER TERM, 1955

No. 518

Helen M. Kiefer, *Petitioner,*

v.

United States of America, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

To the Petitioner's amazement the brief of the Respondent insists that there is no conflict between the decision of the Court below and the decision of the Ninth Circuit in the case of United States v Kelly, 136 Fed. 2d 823, and the decision of the Seventh Circuit in the case of Clohesy v United States, 199 Fed. 2d. 475.

The case of Thompson v United States, 109 Fed. Supp. 283 was decided by District Judge Youngdahl. He was formerly Governor of the State of Minnesota, and a member of the Supreme Court of the State of Minnesota.

Let us refer to the opinion of Judge Youngdahl in the Thompson case where the facts are similar to the facts

in this case. See the question and answers on the application for reinstatement on the bottom of page 284.

In the Thompson case the distinguished jurist stated as follows:

> "This is the situation here. The Veteran's application for reinstatement, when it was approved by the Insurance Section, bore the veteran's "C" number "thus showing to the person or persons passing on the application that the veteran had made an application for Government compensation." Consequently, on those facts, knowledge not only of the Veterans' Administration but also of the Insurance Section of that Department can properly be said to be actual not imputed. Under these circumstances, the Government is in no position to claim here that the fraud of the insured caused the approval of the application for reinstatement.
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> The Court recognizes the fact that the Court of Appeals for the Fifth Circuit has taken a position that seems contra to the position of the Seventh and Ninth Circuits.
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> In the McDaniel case, supra, which is closer to the facts of the case at bar than the Cardwell or Jones cases, supra, the "C" number of the veteran was specified in the application for reinstatement. It is to be noted, however, that the veteran in that case was a college graduate and a lawyer who had served as a legal officer in service and as a personnel officer for government agencies as a civilian while in the instant case the veteran was a common laborer. ASIDE FROM THAT FACT, HOWEVER, THE COURT FEELS THAT THE REASONING OF THE SEVENTH AND NINTH CIRCUITS IS MORE PERSUASIVE, NAMELY, THAT WHEN THE "C" NUMBER OF THE VETERAN'S COMPENSATION CLAIM IS STATED ACCURATELY BY THE VETERAN IN HIS APPLICATION FOR REINSTATEMENT OF INSURANCE, THAT THIS CONSTITUTES ACTUAL KNOWLEDGE TO THE GOVERNMENT OF THE INFORMA-

TION DISCLOSED IN THE COMPENSATION FILE AS TO THE VETERAN'S HEALTH.

The Court concludes, therefore, that the motion by plaintiff for summary judgment should be granted, and that the motion of the defendant for summary judgment, or in the alternative, judgment on the pleadings, should be denied."

The opinion of Judge Youngdahl was followed by District Judge Holtzoff in this case.

Furthermore, Mr. Odom, the Solicitor of the Veterans Administration, rendered the two opinions referred to in the petition following the opinion of the Kelly case. Mr. Odom has been employed as legal counsel for the Veterans Administration for more than thirty years last past and at least for more than ten years last past was the Solicitor, now General Counsel of the Veterans Administration, and during all of this time he was dealing with, or rendering opinions in insurance and other cases requiring legal opinions. The opinions of Judge Youngdahl, Judge Holtzoff and the Solicitor Odom find a conflict in the decisions of the Circuits, so the statement of the Respondent's counsel that there is no conflict cannot be given much credence. Judge Holtzoff and Solicitor Odom have both dealt with government insurance matters for many years, and their opinions should be entitled to great respect, and certainly more respect than the opinions of Judges who have had little experience with government insurance cases.

The Fifth and the Sixth Circuit Judges apparently have been convinced that the insurance division is practically a separate Bureau of the Veterans Administration. No representation could be further from the truth. The questions asked on the application for reinstatement relative to the application for compensation, and the giving of the Claim number were asked from the inception in applications for the reinstatement of government insur-

ance policies, and were asked so that the Insurance Service could consult the files in compensation cases. Throughout the years and until after the close of World War II insurance was reinstated by the central office of the Veterans Administration in Washington, D. C. Compensation was allowed and paid from the various regional offices throughout the country. But for the information of the Central Office, and for the use of the Insurance Section there was kept and maintained in the central office so-called dummy files of the various claimants. These files contained the name and claim number of the veteran, and copies of compensation and other ratings showing the degree of disability, and the medical diagnosis in the case. They also contained copies of the medical reports, and these files were readily available to the Insurance Division, and were resorted to where the application showed on its face that the applicant had applied for compensation. It was a matter of only a few minutes to obtain such a file. It is assumed that this practice continued, and if it did not, there was no valid reason why it should have been discontinued. It is true that there were many more insurance applications than those following World War I but it is also true that there were and are now many more employees of the Veterans Administration in comparison with the number of employees following the close of World War I.

The officials of the Veterans Administration who reinstated the insurance in this case knew that the applicant had filed a claim for compensation and that his file contained all of the medical reports, they also knew that the claim number he gave referred to his compensation claim. They knew further than that, that his file contained medical reports by the medical staff of the Veterans Administration.

In order to prove that a fraud was perpetrated on the government, the burden of proof is upon the government

to show that it was the intention of the applicant for reinstatement to defraud the government. How can it be said that the applicant who stated that he had filed a claim for compensation and gave his correct claim number had any intention to defraud when he knew that his file contained all of the medical reports made by the medical staff of the Veterans Administration showing every disability from which he was suffering. This is not a case where the applicant was treated by a private physician and failed to so state, but where every medical report relied upon by the government to prove a fraudulent intent was contained in their own files of which they had actual knowledge.

The contention that there was any fraud in the reinstatement of the policy sued upon is untenable and based upon theory that the government is not required to take any notice of its own files in the same Bureau, Agency or Administration. The decision below is predicated upon misrepresentation that the Insurance Division of the Veterans Administration is a separate bureau, ignorant of the practice and procedure of that Administration, and when all considered together just plain stupidity in arriving at and applying legal principles to the undisputed facts of the case.

CONCLUSION

The petition has shown perfect grounds for the granting of the writ of certiorari in this case in accordance with the rules of this Court, and for that reason, it is requested that the writ applied for be granted.

Respectfully submitted,

CLAUDE L. DAWSON
Attorney for the Petitioner